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FEDERAL DEPARTMENTS MAY URGE DEPARTMENT OF JUSTICE TO TAKE THE FORT ORD CASE TO THE SUPREME COURT

Mike Lewis

This updates earlier articles regarding the U.S. Court of Appeals for the Ninth Circuit (herinafter"9th Circuit") decision that section 120[1] of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") provides an independent authority for cleanups of federal facilities. The case was ***Fort Ord Toxics Project v. California Environmental Protection Agency et al.***[2]. On 2 September 1999, the 9th Circuit held that Section 120 was in fact an independent authority to conduct remedial action.

As you may recall, the Fort Ord Toxics Project ("FOTP") sued CAL EPA in state court for an alleged failure to analyze the designation of the CAMU under the California Environmental Protection Act ("CEQA")[3]. FOTP named the Army as Real Parties in Interest and sought to enjoin the Army's remedy.

> The Army immediately removed this challenge to U.S. District Court[4], and citing CERCLA section 113(h)[5] sought to have it dismissed. CERCLA section 113(h) provides that:No Federal court shall have jurisdiction under Federal law. . . or under state law which is applicable or relevant and appropriate under section 9621 of this title (relating to clean up standards)to review any challenges to removal or remedial actions selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, ...

The District Court found that the Fort Ord remedy was selected under section 104 as delegated to the Secretary of Defense and that section 120 "establishes a specific procedure for identifying and responding to potentially dangerous hazardous waste sites at federal facilities."[6] The court adopted the logic of ***Werlein v. United States,***746 F. Supp. 887, 892 (D. Minn. 1992); vacated in part, 793 F. Supp. 898 (D. Minn. 1992); that section 120 "provides a

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[1] 42 U.S.C. § 9620 (1998).
[2] Fort Ord Toxics Project et al., v. California Environmental Protection Agency et al., 189 F.3d 828 (9th Cir. 1999).
[3] CAL. PUB. RES. Code §§ 21000 – 21178.1. CEQA § 21080(a) requires an analysis of all discretionary projects carried out or approved by public agencies.
[4] The basis for the Army's removal was 28 U.S.C. § 1442(a) which permits removal to federal court whenever the United States, its agencies or officers are sued in state court.
[5] 42 U.S.C. § 9613(h).
[6] Order Granting Motion for Judgment on the Pleadings and Denying Motion for Summary Judgment and for Remand, No. C-97-20681 RMW May 11, 1998, at 8.

road map for the application of CERCLA.[7] The court specifically rejected FOTP's argument that CERCLA section 113(g) was evidence that Congress intend Section 120 to be an independent cleanup authority. To the contrary, the court found the reference in this section to the President taking the action as supporting the Army's case.[8]

FOTP appealed the District Court's order. In its opinion, the 9th Circuit said FOTP's argument that section 120 was a separate cleanup authority falling outside of the protections of section 113(h), "would lead to a rule that is intuitively unappealing." The 9th Circuit then found this issue to be one of first impression. It opined that CERCLA, section 120(g)[9], seemed to "create a grant of authority separate from sections 104 and 106."

The Army, Navy, Air Force, EPA, and Department of Energy persuaded DOJ to petition the 9th Circuit for a rehearing ***en banc*** in this case. This petition was denied on January 7, 2000, by the same judge who decided the appeal. The same Federal Departments are now discussing the possibility of a DOJ petition for a Writ of Certiorari for the United States Supreme Court to review this case. No decision has been made to date. (Mr. Lewis/LIT)

What's the Frequency Kenneth? FCC Case Broadcasts Guidance on Use of the NEPA Functional Compliance Doctrine

LTC David B. Howlett

A recent case from the Second Circuit Court of Appeals takes a fresh look at the "functional compliance" doctrine. In Cellular Phone Taskforce v. Federal Communications Commission, [10] the court considered whether a rulemaking by the Federal Communications Commission (FCC) met the requirements of the National Environmental Policy Act (NEPA).[11]

The FCC adopted a rule that set guidelines for radio frequency radiation from transmitters including maximum permitted exposure (MPE). The FCC also categorically excluded from formal NEPA review tower-mounted telecommunications antennae 10 meters or higher above ground and rooftop antennae emitting less than 1000 watts of power. The FCC elected to exempt such facilities after determining that they pose no risk of exposing humans to RF radiation in excess of MPE levels.

Petitioners challenged the rules on a variety of grounds, including FCC's failure to perform a NEPA analysis for the radiation rule and the alleged arbitrariness of the categorical exclusion.

The court dealt with the challenge to the categorical exclusion first. In light of the low probability of excluded facilities violating MPE levels, the court found it was reasonable to exclude them from detailed NEPA analysis. Moreover, the licensees were still responsible for compliance, and an interested person could petition the FCC for review of a site believed to violate the MPE levels. The court found the FCC's approach was rational and upheld the adoption of the categorical exclusion.

The court then decided the issue of whether the FCC was required to prepare an EIS in conjunction with its rulemaking. To begin, a rulemaking can be subject to NEPA if it

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[7] ***Id.***, at 10.
[8] ***Id.***
[9] CERCLA section 120(g) states that "no authority vested in the Administrator under this section may be transferred, by executive order of the President or otherwise…".
[10] Docket Nos. 97-4328(L); 98-4003(Con); 98-4005(Con); 98-4025(Con); 98-4122(Con); 2d Cir., 2000 U.S. App. LEXIS 2770, February 18, 2000.
[11] 42 U.S.C. §§4321 et seq.

constitutes a major federal action significantly affecting the quality of the human environment. The court noted, however that "where an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient."[12]

The function of NEPA to allow the decision-maker to take a hard look at the environmental impacts of a proposed action, consider alternatives to it, and allow public participation in the analysis. The court concluded that the FCC rulemaking functionally met the requirements of NEPA "both in form and substance."[13]

First, the rulemaking included public participation. The FCC also "consulted with and obtained the comments of any Federal agency which has jurisdiction by law or special expertise with respect to[the] environmental impact involved," another requirement of NEPA.[14] The FCC also considered environmental impacts including cumulative effects. Although the court did not mention this, the rulemaking also considered alternatives in that it looked at a variety of possible MPE levels. Finally, any site-specific impacts would be analyzed through the NEPA process when individual facilities are planned.[15] The court concluded that the FCC rulemaking met the functional compliance test.

Army Regulation 200-2[16] recognizes the functional compliance test. Generally, the regulation allows decision-makers to determine that an action has been adequately addressed by existing documents and found not to be environmentally significant.[17] The agency must memorialize its determination in a record of environmental consideration (REC). The regulation also recognizes that a CERCLA[18] Feasibility Study eliminates the need for a NEPA analysis "[i]n most cases." [19] A REC is not required, but the cover of the Feasibility Study should state that it is meant to comply with NEPA.[20]

Outside the world of CERCLA, it is quite risky for Army planners to rely on the functional compliance doctrine. If there is time to do a proper NEPA analysis, it should be done. If an existing study looked hard at environmental impacts, considered alternatives, and involved the public, it could be relied upon to serve the function of NEPA. This course of action, however, could result in a court returning the issue back for a real NEPA analysis. (LTC Howlett/LIT).

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[12] 2000 U.S. App. LEXIS 2770 at *27, ***quoting*** Environmental Defense Fund v. EPA, 489 F.2d 1247, 1257 (D.C. Cir. 1973).
[13] 2000 U.S. App. Lexis 2770 at *27.
[14] 42 U.S.C. §4332(c).
[15] Essentially, this means that the non-NEPA rulemaking is serving a "tiering" function.
[16] Environmental Effects of Army Actions, 23 December 1988.
[17] Army Regulation 200-2, ¶ 3-1a. Elsewhere in the regulation (¶ 2-3d(1) and ¶ 2-3e(1)), the previous document relied upon must be either a NEPA environmental assessment or an environmental impact statement. Reliance on coverage on non-NEPA documents is not shown in the regulation's NEPA flow chart. To the extent this creates ambiguity, one must hope it will be resolved as AR 200-2 is rewritten.

[18] Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, et seq.
[19] Army Regulation 200-2, ¶ 2-2a(8). Whether the documentation for a CERCLA removal action can legitimately serve as a NEPA substitute is beyond the scope of this article.
[20] Id.